

10-15-2006

Security in Administrative Hearings

Lea Anne Burnett

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Courts Commons](#)

Recommended Citation

Lea Anne Burnett, *Security in Administrative Hearings*, 26 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2006)
Available at: <http://digitalcommons.pepperdine.edu/naalj/vol26/iss2/1>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Security in Administrative Hearings

By Lea Anne Burnett*

Courtroom violence has become all too frequent in recent months. For instance, there is the much-reported case of Brian Nichols. Nichols stands accused of murdering a Georgia state judge, a court reporter, a sheriff's deputy, and a federal agent, after allegedly stealing a gun and escaping from the Fulton County Courthouse in Atlanta—an event which occurred immediately before his scheduled trial.¹ Another less prominent case occurred a few days earlier: David Hernandez Arroyo, Sr. died after shooting several people outside of the Smith County Courthouse in Tyler, Texas. Evidence suggested that Mr. Arroyo elaborately planned the attack, which killed his ex-wife, with whom he was entangled in a dispute over child support.²

More recently, on February 23, 2006, a 42-year old man entered an office building in Phoenix, Arizona, armed with a knife and a gun. After entering the building, he grabbed an administrative assistant and forced her into a courtroom located off the main lobby area. The assailant held nine people hostage for over eight hours while

* Senior Contracts Attorney and Former Administrative Law Judge, Texas Department of Transportation. Any opinions expressed by the author in this article are hers alone, and are not necessarily those of the Texas Department of Transportation, its Administration, or the Texas Transportation Commission. © Lea Anne Burnett 2006, All Rights Reserved. This article and the survey information are printed and distributed with permission.

1. David Mattingly, et al., *Nichols to Make court Appearance Today* (Mar. 15, 2005), <http://www.cnn.com/2005/LAW/03/14/atlanta.shooting>.

2. Mark Collette, et al., *Man Shoots Ex-Wife, Bystander at Courthouse, Killed by Police After Chase*, TYLER MORNING TELEGRAPH at 1A, (Feb. 24, 2005), available at http://www.tylerpaper.com/site/news.cfm?newsid=14032843&BRD=1994&PAG=461&dept_id=226369&rfti=6.

authorities negotiated their release.³ This last incident stands unique among the group, because the alleged gunman was not a defendant in a criminal proceeding, or a defendant sued in civil court. The building in which the courtroom was located likely did not employ elaborate security, if any at all. Instead, this incident erupted at the offices of the National Labor Relations Board during an administrative hearing.

“Without security the public’s confidence in the integrity of the judicial system is threatened. The proper administration of justice requires that courts operate in a safe and secure environment.”⁴ While this statement certainly holds true for courts, it should be recognized that it is no less true for administrative hearings.

I. INTRODUCTION

From occupational licenses to workers’ benefits and beyond, administrative hearings serve as a quasi-judicial forum to decide important questions involving people’s lives and livelihoods. Administrative Law Judges (ALJs) preside over these hearings, which concern careers, finances, benefits, and even families.

Some parties to these hearings appear before ALJs unrepresented, uninformed, and unsure of the administrative law process. These parties may have had prior negative experiences with the legal system, or worse, with the individual that filed the complaint against them before the agency. Sometimes the participants are emotionally disturbed individuals, or even under the influence of drugs or alcohol. Not surprisingly, at times these hearings can become emotionally charged.⁵

In these situations, the ALJ shoulders the primary responsibility, or perhaps the primary opportunity, to maintain the safety and security of hearing participants. Most attorneys are aware of the

3. Judi Villa & Lindsey Collom, *Hostage Standoff Ends Peacefully*, THE ARIZ. REPUBLIC (Feb. 24, 2006), available at <http://www.azcentral.com/arizonarepublic/news/articles/0224hostageupdate.html>.

4. Bd. Of County Commr’s v. Nineteenth Jud. Dist., 895 P.2d 545, 548-49 (Colo. 1995).

5. See Don Hardenbergh, *Protecting America’s Courthouses*, 44 THE JUDGE’S J. 14 (Summer 2005) (suggesting that visits to the courthouse are emotional events for the participants).

great expenditure of resources directed towards security in the courts over the last decade. But what tools have federal, state, and local authorities provided ALJs to address safety concerns in administrative hearings?

This article explores security in administrative hearings throughout the United States, as well as issues that affect it. To that end, a survey was circulated among members of the National Association of Administrative Law Judges (NAALJ) and their colleagues in September 2005 to gauge the level of security devoted to administrative hearings nationwide, as well as the level of perceived or actual risk to safety.⁶ Additionally, this article offers suggestions and resources to agencies to address security concerns in hearings. Furthermore, it identifies and discusses pertinent case law and other materials helpful in formulating agency policy regarding the adoption of security measures.

II. THE NEED FOR SECURITY

Certainly, this country has not seen a widely-publicized event of violence against an ALJ-at least not yet. However, many ALJs receive threats in the course of conducting their duties. Over half of the ALJs responding to this survey believe that their safety has been threatened, at one time or another, related to their work in conducting administrative hearings. Similarly, over half the ALJs indicated that their agencies have failed to direct sufficient resources to address security.

In 2005, Judge James M. Riehl wrote on the need for greater security in courtrooms across the country.⁷ He keenly observed that “[a]ccess to a peaceful resolution of disputes is fundamental to our system of justice. Not only is it critical to the issue of access to justice, but also to the basic concept of judicial independence.”⁸

Beginning in the 1990’s, many states moved to create central hearing panels to hold hearings for administrative agencies.⁹ These

6. Survey of NAALJ Members on Security, September 2005.

7. James M. Riehl, *A Safe Forum for Justice*, 44 THE JUDGE’S J. 1, (Summer 2005).

8. *Id.*

9. See Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990’s*, 15 J. NAT’L ASS’N ADMIN. L. JUDGES 107, 107-36 (1994). See also The

states often indicated that the primary reason for the creation of central panels was to provide a central independent agency to administer the hearing function.¹⁰ As Judge Riehl noted, “[j]udicial independence cannot exist in an environment of intimidation, fear, or violence. Failure to provide such a safe forum is unacceptable for a free and open society.”¹¹

It cannot be argued that ALJs are any less deserving of a safe environment in which to conduct hearings than state court judges. Similarly, the participants in administrative hearings need a secure environment in which they can present or defend their rights. The New Hampshire Supreme Court stated, “[a]n integral part of any court’s duty to administer justice and fairly adjudicate disputes is to ensure that all parties have the opportunity to advance their cause in an atmosphere of safety, decorum, and fairness.”¹² Do the agencies that hold administrative hearings provide such an atmosphere? The survey results discussed below reveal what some of the adjudicators think.

III. SECURITY SURVEY

A. Methodology

The survey consisted of approximately thirty-seven questions¹³ forwarded to NAALJ members by email through the mailing list used by NAALJ for distribution of the newsletter, and other organizational notices. The survey was also sent to several ALJs through a separate, and perhaps, overlapping email. Additionally, some initial recipients of the survey forwarded the document to other fellow ALJs.

In all, over seventy ALJs, or groups of ALJs, responded to the survey. These respondents hailed from thirty states, plus the District

State Office of Administrative Hearings,
http://www.oag.state.tx.us/AG_Publications/txts/2002adminlaw2.shtml (last
 modified Nov. 3, 2003, *and* About the Office of Administrative Hearings,
<http://www.oah.state.md.us> (last modified Nov. 3, 2003).

10. *Id.*

11. Riehl, *supra* note 7, at 3.

12. *In re Mone, et al.*, 719 A.2d 626, 632 (N.H. 1998).

13. The survey was created, circulated, and tabulated in September and October, 2005.

of Columbia. In some cases, the survey responses indicated that an entire panel from one jurisdiction filed the answers as a group. Based upon the membership numbers maintained by NAALJ, this indicates that over ten percent of the NAALJ membership body responded to the survey, assuming the respondents were NAALJ members. Geographically, the survey respondents represent some sixty percent of the country by state. Because of the method in which the survey was distributed, as well as the tendency of initial recipients to forward the survey to other colleagues, it is not possible to determine how many individuals received the survey, and therefore, calculate an exact response rate.¹⁴ Furthermore, no one group or agency keeps statistics on the number of ALJs that practice across the country.

B. Bias

Before continuing, it is appropriate to acknowledge any potential bias in the information presented by the article. Obviously, survey participation was entirely voluntary. Thus, it is possible that individuals with a particular interest in this subject, or a particular concern, were most likely to file responses.¹⁵ Given the manner in which the survey was conducted, there did not appear to be a way to account for this type of bias, other than to acknowledge its potential existence to avoid misleading the reader.¹⁶

14. See Response Rates, <http://www.daa.com.au/analyticalideas/responserates.html> (last visited Nov. 29, 2006) (describing how response rates are calculated in surveys). See also Gary Halpenny & Don Ambrose, *Whither Survey Response Rates: Do They Still Matter?* Presentation of the MRIA Response Rate Committee (June 2006), <http://www.tns-cf.com/conferences/TNSCFWhither%20Survey%20Response%20Rates.pdf> (last visited Nov. 29, 2006) (discussing how relatively low response rates may yield accurate results).

15. This type of bias is referred to as "Non-response" bias, which is one way of describing an error in the sampling population. See Anne G. Scott and Lee Sechrest, *Survey Research and Response Bias*, Univ. of Ariz., (1993), available at www.amstat.org/sections/srms/proceedings/papers/1993_036.pdf (last visited Nov. 29, 2006).

16. *Id.*

Additionally, not every state responded in equal numbers. Therefore, it is also possible the answers from one state might skew the data in one direction or another. To minimize this possibility, survey results were capped at no more than ten per state. Only one state reached this upward limit. Additionally, same-state respondents represented different jurisdictions and subject matters. Based on tabulations made throughout the survey process, it was determined that the inclusion of more than five respondents from any one particular state did little to alter the basic pattern of results on a percentage basis. With this in mind, the following results have been tabulated and are summarized below.

C. Diversity of Respondents

State Administrative Law Judges comprise the vast majority of respondents to the survey. However, other ALJs employed by cities and counties also filed responses to the survey. These ALJs practice in many different areas of legal specialization, including health, human services, education, environmental, employment, motor vehicles, and tax. The largest classification represented among the respondents was general regulation, or those who hold hearings on a wide range of topics. It is likely that these ALJs represent central panels operating with statewide jurisdiction. The next most represented group was health and human services. Other areas of practice include motor vehicles, employment, education, and prison related hearings.

Some fifty-five percent of survey respondents were hired into their positions, while approximately forty-five percent were appointed.¹⁷ By far, the majority of the ALJs who responded hold statewide jurisdiction in their particular areas of practice. A full eighty percent of those surveyed travel between multiple hearing sites, many times covering hundreds of miles. About twenty percent of survey respondents conduct hearings from a single central site.

17. Any survey respondents who reported that they were appointed or hired through civil service were included in the category of appointed.

D. Hearing Sites

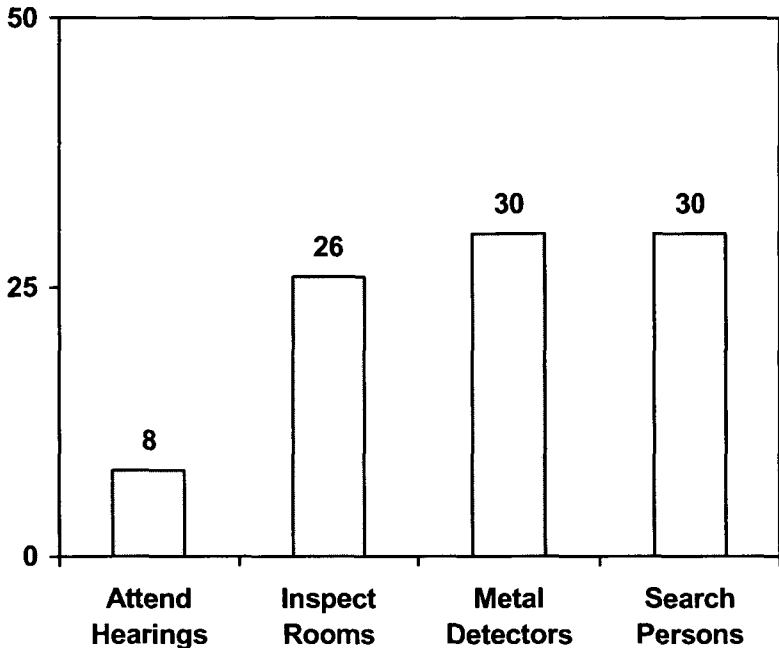
In order to determine the feasibility of providing or increasing security for administrative hearings, the survey asked questions aimed at discerning whether agencies actually controlled the sites where hearings are conducted. Considering that some eighty percent of responding ALJs travel between different locations for hearings, it stands to reason, and the survey confirms, that the types of locations where hearings are held vary from jurisdiction to jurisdiction. Some agencies hold hearings in government buildings. Others hold them in hotels, prisons, schools, or other locations germane to the subject of the hearing. Around thirty-three percent of the surveyed ALJs hold at least some hearings in courthouses. This is important to note because ALJs who did conduct some hearings in courthouses appeared to have more security available for all of their hearings.

E. Officers

Over sixty percent of the ALJs answering the survey reported that their hearing sites had security officers in the buildings where the hearings are held. However, there was a wide divergence between the methods in which the officers were deployed. Similarly, there was a great variation between the perceived effectiveness of these officers. In many cases, security constituted unarmed, private security guards in whom the survey respondents put little faith.¹⁸ Few stated that officers attend hearings or inspect rooms throughout the day. Less than twenty percent reported that their buildings had more than one security station.

18. When deciding whether to use security officers as a part of a security plan, it is a useful exercise to determine the parameters of an officer's role. The New Jersey Division of Criminal Justice Police Training Commission published its training manual for sheriff's officers online. Of particular interest are Instructional Unit 16.2 and 16.3, which provide a wide overview of duties assigned to sheriff's deputies in a court setting. See *Agency Training for Sheriff's Officers*, http://www.state.nj.us/lps/dcj/njptc/manuals/16_sheriff.pdf (July 1, 2002) (last visited Nov. 29, 2006).

Below is a graphic representation of the survey results regarding questions related to particular types of physical security used at hearing sites. The graph below expresses the percentage of respondents who reported that officers take an active role in attending hearings, and shows some of the duties they perform.



IV. SECURITY RESOURCES AVAILABLE ON-SITE

In case of a security emergency, the time it takes to summon assistance can have great effect on whether a situation ends up with a positive outcome. The vast majority of survey respondents appear to have a general idea of what jurisdiction has primary responsibility for policing hearing locations. But surprisingly, the survey results indicate that approximately nine percent of responding ALJs were not sure how close the nearest security station or facility was.

Where security is not available on-site, the ALJ stands as the first line of defense against any security situations that might occur.¹⁹ Thus, it is imperative that the ALJ possess basic information regarding the location and response time of state or local officers who are expected to respond in the event of an emergency.

A. Firearms

Some twenty percent of ALJs surveyed reported that firearms are permitted in buildings where hearings are conducted, while forty-three percent stated that firearms were legal to possess in the parking lots of hearing sites. Nearly seventy percent of survey respondents indicated that firearms are illegal to possess in hearing buildings.

Other respondents noted in their answers that while it is legal for outside visitors to possess firearms in hearing buildings or parking lots, employees were strictly forbidden from carrying them. However, one respondent stated that employees could bring firearms into the workplace, so long as they did not brandish them.

In Texas, public and private employers can prohibit their employees who hold concealed handgun licenses from bringing those weapons on the premises.²⁰ Additionally, it is illegal for anyone to

19. For example, 28 C. F. R. § 68.28 (2006) states:

(a) *General Powers*. In any proceeding under this part, the Administrative Law Judge shall have all appropriate powers necessary to conduct fair and impartial hearings

(b) *Enforcement*. If any person in proceedings before an Administrative Law Judge disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same...the Administrative law Judge responsible for the adjudication may, where authorized by statute or law, apply through appropriate counsel to the Federal District Court having jurisdiction in the place in which he/she is sitting to request appropriate remedies.

One could draw the conclusion that, during an emergency, the ALJ would have the right—if not responsibility—to call in the appropriate authorities to subdue a hearing participant or witness.

20. TEX. GOV'T CODE ANN. § 411.203 (Vernon 2006). See also Op. Att'y Gen. Tex. DM-363 (1955). It should be noted that this opinion was written prior to certain legislative changes in TEX. PEN. CODE ANN. § 30.06 (Vernon 2006), which restricted a state agency's ability to limit a concealed handgun-license holder from carrying a handgun on state property.

bring a firearm, illegal knife, club or other prohibited weapon “[o]n the premises of any government court or offices utilized by the court, unless pursuant to the written regulations or written authorization of the court”²¹ So, despite the fact that Texas law also provides for concealed-carry weapon permits, a permit holder cannot bring a concealed weapon to court.²² However, the definition of “premises” does not include a “public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.”²³ Thus, this question is raised: Do administrative hearings fall under the category of “government court or offices?” Even if they do, it would appear based upon the definition of “premises,” that a concealed handgun license holder could legally possess a weapon in the parking lot of a building holding an administrative hearing in Texas. However, an agency could restrict that license holder’s ability to carry a weapon into its parking lot if that individual were an employee of the agency.

B. Security Plans

Approximately forty-one percent of the responding ALJs noted that their agency or hearing locations possess a general security plan. About the same number of respondents stated that there was no general security plan for their hearing locations, while sixteen percent were unsure whether or not their hearing locations had security plans in place. The survey did not require respondents to specify what type or level of plan. Barely one-third of the survey respondents stated that security plans were discussed in any meaningful way.

To aid in preparing a security plan, the National Center for State Courts (NCSC) provides a comprehensive list of sources on security

21. TEX. PEN. CODE ANN. § 46.03(a)(3) (Vernon 2006). Yet, governmental agencies cannot restrict one’s right to carry a concealed weapon—if carried by a permit holder—by giving written notice to the permit holder pursuant to Texas’ concealed handgun statute. See § 30.06(e).

22. TEX. PEN. CODE ANN. § 46.03(f). “It is not a defense to prosecution under this section that the actor possessed a handgun and was licensed to carry a concealed handgun” *Id.*

23. *Id.*

and emergency planning.²⁴ Not surprisingly, courts all across the country have examined security in a wide variety of areas. Some of NCSC's topics include rural security, mail security, personal security, and even family security. Also, the site has resources on courtroom design and data security.

Other states also publish tools for determining security needs for its courts. For instance, the Michigan Supreme Court Administrative office has a security audit checklist on its website.²⁵ This document provides a comprehensive checklist for courts, covering subjects from emergency procedures to judicial chambers and beyond. This type of tool can assist an agency to create a security plan or modify existing plans for administrative hearings.

The Utah Judicial System also publishes Judicial Design Guidelines that aim to provide design parameters for building state courthouses. Included in the guidelines related to courtroom security are these statements:

It has long been recognized that judges are at risk while sitting on the bench during open court. They are the most likely targets of hostility as they symbolize the justice system and have primary involvement in the punishment phase of trials and pleas. For these reasons, judges should be afforded greater protection than other courtroom participants.²⁶

24. National Center for State Courts, *Court Security Resource Guide*, available at <http://www.ncsconline.org/WC/Education/CtSecuGuide.htm> (last visited Nov. 29, 2006). While some of its suggestions are naturally better suited for courts than administrative hearings, it does provide a broad outline of issues to be considered in creating a security or emergency plan. See also National Center for State Courts, *Court Security*, available at <http://www.ncsconline.org/WC/FAQs/CtSecuFAQ.htm> (last visited Nov. 29, 2006), and National Center for State Courts Best Practices Institute, *Emergency Management for Courts*, available at <http://www.ncsconline.org> (last visited Nov. 29, 2006).

25. See Michigan Courts, *Index of Handbooks and Manuals*, available at http://www.courts.michigan.gov/scao/resources/publications/manuals/security/cs_Audit-Checklist.pdf (last modified July 24, 2006).

26. See Utah Courts, *Utah Judicial Master Plan for Capital Facilities*, Section 5.9, available at <http://www.utcourts.gov/admin/facilities/Section-II.htm> (last visited Nov. 29, 2006). It also recommends that "[e]ach judge's bench should be equipped with a silent duress alarm connected to an outside security station or a staff office of trained personnel," and further that a judge's bench be of sufficient size/material to deter attack, including gunfire." *Id.*

As a response to similar security concerns related to the physical safety of ALJs, some agencies have implemented the use of certain devices that give ALJs the ability to summon help if needed. Approximately one-quarter of those surveyed stated that their agency provides such security devices. Most frequently, respondents answered that remote panic buttons were installed to allow an ALJ to surreptitiously call security officers to the hearing room. A similar option reported was the use of personal panic alarms. At least one respondent, however, mentioned that security officers advised against using alarms because the resulting noise might agitate aggressive individuals.

In some cases, the agencies provide remote video viewing by security officers for hearings. Still other agencies increased security between public areas and staff offices, including the addition of bulletproof glass. A few respondents stated that their agencies have increased security officers, or employed armed guards to patrol.

These sorts of gadgets appear to provide a higher degree of security—if hearings are held in a central location. But, as previously mentioned, a significant portion of ALJs are required to travel between different sites to hold hearings. Some of these sites are not owned or leased by the agency, but instead are located in strip malls, hotels, or other buildings. For these ALJs, it is not possible to install panic buttons, metal detectors, or access key-pads at all the hearing locations. Nevertheless, there are still ways to secure such hearings. For instance, one survey respondent suggested holding telephone hearings if there is some concern regarding the parties or witnesses in a particular case. This is a simple and cost-effective solution.²⁷

Additionally, video-conferencing is becoming a more readily available option.²⁸ Where an agency has multiple satellite offices across the city or the state, video-conferencing sites can be made

27 . For comparison, note that the cost of providing security to state courts in California topped \$370 million dollars in FY 2004-2005, or approximately 16% of the statewide budget of trial courts. This funding level allows for a staff ratio of 1.7 deputy sheriffs for each judicial position. See California Courts, *Court Security*, available at <http://www.courtinfo.ca.gov/reference/courtsecurity.pdf> (last visited Nov. 29, 2006).

28. Cf. H. German, *The Use of Video Conferencing to Enhance Courtroom Security*, 44 THE JUDGE'S J. 34, 34-35 (Summer 2005) (discussing increased availability of video conferencing in court hearings).

available to hearing participants in lieu of live hearings.²⁹ The initial outlay for this type of equipment could be quite expensive. Nevertheless, over time it could amount to great savings in travel, rental, and other costs associated with sending ALJs across the state.³⁰

C. Perceived Security

Sixty-two percent of those surveyed stated that they had received notification of a potential security risk prior to a hearing. In most cases, the ALJs requested extra security, which was provided by their agencies to address whatever concern existed. Unfortunately, a small number of respondents indicated they were pressured, or left alone, to handle particular security concerns themselves.

So what might constitute a security concern in an administrative hearing? First and foremost, sixty-six percent of those surveyed indicated that they had received threats related to their duties. These threats took a number of different forms. The most common are illustrated in the tables below.³¹

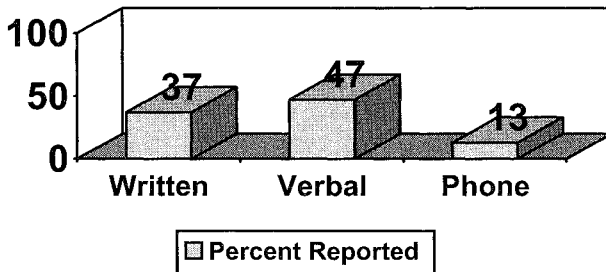


FIGURE 1

29. *Id.* Apparently, these set-ups are now more commonly used for the arraignment of criminal defendants.

30. *Id.*

31. Figure 1 refers to how threats are received by ALJs. Figure 2 (next page) refers to the types of threats received by ALJs. For example, direct threats include specific threats made to or about a particular ALJ. Indirect threats include instances where certain individuals made veiled or non-specific threats that were more subjective in nature. Property threats would be any threats made against the real or personal property of an ALJ. One could report receiving more than one type of threat.

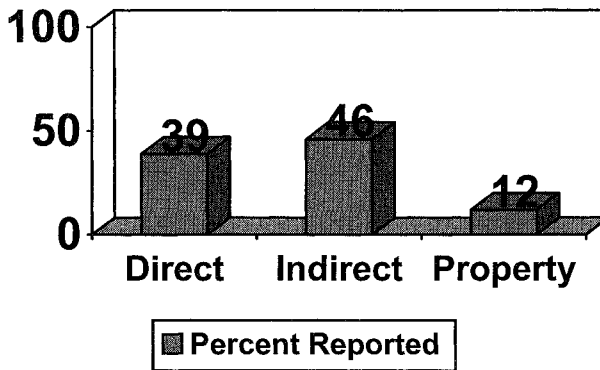


FIGURE 2

V. TYPES OF THREATS RECEIVED

A full fifty-one percent of survey respondents stated that they felt their safety was threatened while conducting a hearing. The most common cause was unruly or emotionally disturbed parties. Another significant safety concern indicated by respondents was the presence of intoxicated individuals at hearings. In some isolated cases, ALJs stated that hearing participants or spectators brought weapons. In addition, ALJs expressed concerns about the lack of entrances or exits to a hearing location where a large number of audience members attended.

Sadly, some twenty-two percent of ALJs surveyed reported actual events that threatened the safety or security of a hearing or an ALJ. One survey reported that a colleague had been stalked by a hearing participant. More than one jurisdiction reported that hearing participants filed false liens against an ALJ's property. Other ALJs related stories about hearing participants who called or visited their homes—uninvited, of course. And though rare, the survey did contain reports of attempted or actual physical attacks.

VI. STATE AUTHORITY

The judicial authority to provide security is considered an inherent power of the judicial branch in many jurisdictions.³² State agencies, however, are creatures of statute, and are endowed only the powers granted to them by the legislative body that creates them.³³ Thus, state authority to provide security in administrative hearings likely comes from an agency's enabling statute, and can be granted either by direct language or by implication.³⁴

For example, in Oregon, administrative rules maintain that where any attorney or party has knowledge of a potentially dangerous situation, that party should immediately notify the hearing

32. See *In re Mone*, 719 A.2d at 631-32, stating:

[I]t is beyond dispute that the judiciary has the power to control its courtrooms. 'The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice.'

Id. (citations omitted). See also, *State v. Zhu*, 761 A.2d 523, 530 (N.J. 2000) ("A trial judge is given wide discretion in determining proper security measures within the courtroom and is obliged to act to protect the jury, [defendants,] counsel, witnesses, and members of the public.") (citations omitted). See also, *Smith v. Wash. County*, 43 P.3d 1171, 1179 n.8 (Or. 2002).

33. 2 AM. JUR. 2d *Administrative Law* § 50 (2006). "Being creatures of the legislature, administrative agencies have no general, inherent, or common-law powers, but only those powers conferred upon them by statute." *Id.* See also 73 C. J. S. *Public Administrative Law and Procedure* § 110 (2006) (stating that the words and purpose of the enabling act, as well as the underlying legislative intent define the scope of an agency's power to act). See also *Wisc. Citizens Concerned for Cranes & Doves v. Wisc. Dept. of Natural Res.*, 677 N.W.2d 612 (Wisc. 2004) (holding that the nature and scope of an agency's powers are issues of statutory interpretation) and *Waukee v. City Dev. Bd.*, 514 N.W.2d 83 (Iowa 1994) (holding that courts cannot expand an agency's authority beyond the parameters set by the legislature). See also *Clark County Sch. Dist. v. Clark County Classroom Teachers Ass'n*, 977 P.2d 1008, (Nev. 1999) and *In re Mountain States Tel. & Tel. Co.*, 745 P.2d 563 (Wyo. 1987) (asserting that courts cannot interpret an enabling statute as to alter an agencies' powers).

34. See *Smith*, 43 P.3d at 1179-1182 (discussing the statutory authority of the Chief Judge of the Oregon Court of Appeals and the presiding judges of each district to exercise administrative authority, as well as supervision, of their subordinate courts). The Oregon Court of Appeals held this language implicitly granted those judges authority over security measures. *Id.*

Administrative Law Judge.³⁵ Furthermore, all decisions involving security provided at the hearing are within the discretion of the presiding Administrative Law Judge.³⁶ In New York, a state statute provides that a security station should be in place at the main entrance to screen all persons entering the courthouse.³⁷ Additionally, a security control station should also be established as a “communication center” to act in emergency situations.³⁸

VII. CIVIL RIGHTS

In survey responses, the most commonly cited reason for *not* increasing security was the budget. A close second was the concern for the constitutional rights of hearing participants. A particular case of interest on this subject recently came out of the Supreme Court of Hawaii, *Freitas vs. Administrative Director of the Courts, State of Hawaii*.³⁹

This case involved Darcy C.K. Freitas, who contested the revocation of his driver’s license following an arrest for driving under the influence (DUI).⁴⁰ Freitas appealed a final order sustaining the revocation of his driver’s license based on the agency’s sign-in procedure, as he alleged it limited public access to his hearing. Immediately prior to the license revocation hearing, an unidentified woman arrived at the Administrative Driver’s License Revocation Office (ADLRO) and asked to attend the hearing.⁴¹ This individual refused to provide identification or sign-in with the receptionist, and thus was denied entry to the hearing.⁴² During the administrative hearing, Freitas’ counsel attempted to elicit evidence about this incident, including testimony from the receptionist and the Chief

35. OR. ADMIN. R. 438-006-0110 (2006).

36. *Id.*

37. N.Y. COMP. CODES R. & REGS. 22, § 34 (2006).

38. *Id.*

39. *Freitas v. Admin Dir of the Courts*, 92 P.3d 993 (Haw. 2004) [hereinafter *Freitas I*].

40. *Id.*

41. *Id.*

42. *Id.* Interestingly enough, the individual did not object to a physical security search of her person, but did object to the sign-in procedures as an “invasion of privacy.” *Id.* at 994 n.1.

Adjudicator.⁴³ The hearing officer, however, denied the entry of this evidence.⁴⁴ Yet, the hearing officer did allow counsel to make representations into the hearing record about what was said to the woman who was denied entry.⁴⁵ Frietas' counsel requested a hearing on the matter, but this request was also rejected.⁴⁶ Frietas appealed the agency decision to the first circuit District Court in Hawaii, and the court affirmed the agency decision.⁴⁷

Frietas then pursued an appeal to the Hawaii Supreme Court.⁴⁸ In his appeal, Frietas maintained that the United States Constitution and the Hawaii State Constitution guarantee public access to administrative hearings.⁴⁹ He further argued that a party is guaranteed the right to a hearing on the validity of any restrictions on that access.⁵⁰ Thus, he argued, the lower court erred when it ruled by implication that his constitutional rights had not been violated.⁵¹ In reviewing the ruling, the Hawaii Supreme Court applied a standard of review where it "must determine whether the court under review was right or wrong in its decision."⁵²

The Hawaii Supreme Court determined that Frietas lacked standing to claim that his rights were violated based on a right of access the barred woman could have claimed.⁵³ However, the Court also recognized that administrative hearings, such as the ADLRO hearing, are quasi-judicial.⁵⁴ Therefore, due process requires that

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47. *Id.* at 994 n.3. "The [c]ourt finds none of the arguments raised by counsel sufficient to warrant reversal, and the [c]ourt find[s] no reversible error in the record." *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52. *Id.* at 994 (quoting *Soderlund v. Admin. Direc. of the Courts*, 26 P.3d 1214, 1218 (Haw. 2001)).

53. This holding was based on a prior court decision, *Kaneohe Bay Cruises, Inc. v. Hirata*, 861 P.2d 1, 9 (Haw. 1993).

54 *Id.*

administrative hearings be public.⁵⁵ Nevertheless, the court also found that the public's right of access to an administrative hearing can be qualified. For courtroom proceedings, it explained, there are two recognized categories of exceptions for which public access may be restricted: (1) order and decorum of the proceedings; and (2) content and disclosure of information in the proceedings. The court applied these restrictions by analogy to administrative hearings in Hawaii.⁵⁶

To elaborate on the first category of exceptions, the Court explained that any such restrictions under that category must clear a three-prong test to pass constitutional muster. The test, similar to that applied to speech restrictions, is as follows: (1) The restriction on access must be serving an important governmental interest; (2) be unrelated to the content of information to be disclosed in the proceeding; and (3) be the least restrictive way to accomplish that goal.⁵⁷ In its holding, the Court determined that the ADLRO acted improperly in denying Frietas a hearing on his objections to the identification procedures employed at his administrative hearing. They remanded the case back to the ADLRO to allow for a hearing to determine whether its procedures were constitutional based upon its application of the test.⁵⁸

55. *Frietas I*, 92 P.3d at 998. In arriving at this conclusion, the court quoted *Detroit Free Press v. Ashcroft*, which stated,

[I]n administrative proceedings of a quasi-judicial character[,] the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing,' essential alike to the validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process...[therefore,] when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 943 (E.D. Mich. 2002)

56. *Frietas I*, 92 P.3d at 997 (citing *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179-80 (6th Cir. 1983)).

57. *Id.* (quoting *Brown*, 710 F.2d at 1179 (citations omitted)).

58. *Frietas I*, 92 P.3d at 997.

Following the Court's ruling, the ADLRO held a hearing on Frietas' objections to the sign-in and identification procedure for driver's license revocation hearings.⁵⁹ The hearing officer issued supplemental findings of fact and conclusions of law related to the identification and sign-in procedures.⁶⁰ The ADLRO found, among other things, that the procedures were a reasonable way to identify and apprehend people who "might engage in unlawful or inappropriate behavior."⁶¹ Also, the procedures deterred people from entering past the reception area, particularly those who wanted to act unlawfully within a hearing or to disrupt the inner business offices.⁶² The agency concluded that the procedures served "an important governmental interest," by improving security and minimizing disruption.⁶³ The ADLRO further concluded that the governmental interest in maintaining security was not related to the subject of the hearing, either person or information.⁶⁴ And finally, it determined there was no less restrictive means by which to accomplish these purposes.⁶⁵

The District Court again affirmed the findings of the ADLRO and Frietas appealed the case, returning it back to the Supreme Court of Hawaii. Upon second review, the Supreme Court of Hawaii determined in a split decision that the ADLRO's sign-in and identification process did not violate the appellant's due process rights to a publicly accessible hearing.⁶⁶ The majority focused on the ADLRO's evidence and findings that pertained to the three-pronged test elicited in *Frietas I*.⁶⁷ To support its holding, the majority cited

59 *Id.*

60. *Frietas v. Admin. Dir. of the Courts*, 116 P.3d 673 (Haw. 2005) [hereinafter *Frietas II*].

61. *Frietas II*, 116 P.3d at 676.

62. *Id.*

63. *Id.* at 678.

64. *Id.*

65. *Id.*

66. *Id.* at 679.

67. *Id.* The majority held:

(1) that the ADLRO's identification and sign-in procedure serves and important government interest in securing ADLRO hearings, (2) that the security procedure is unrelated to the content of the information disclosed at ADLRO hearings, and (3) that there is

a number of criminal cases where other state and federal courts had found various identification procedures were not in violation of the sixth amendment, which guarantees defendants the right to public trial. Chiefly, the *Freitas II* court granted much deference to the findings of the ADLRO, and declined to supplant its judgment on security issues—relying on *United States v. DeLuca*.⁶⁸

In *Frietas II*, the Court also relied on other cases supporting the ADLRO's arguments.⁶⁹ At most, the Court held,

[t]he identification requirement introduced a minor procedural hurdle to gaining admittance to the trial by demanding the production of some form of identification, which is an item readily available to the general public...In sum, this simply is not a case of partial or total closure of the proceedings to the public

70

Thus, it held that the procedure failed to run afoul of the sixth amendment.⁷¹ Nevertheless, the majority opinion in *Frietas II* also noted that in the *Williams* case the court went beyond its ruling on the sign-in procedures. Using its supervisory power, the Indiana Supreme Court commanded trial courts that use enhanced security

no less restrictive way to meet the goal of securing ADLRO hearings. As such, we hold that the ADLRO's identification and sign-in procedure does not impermissibly infringe upon *Frietas*' constitutional right to a public hearing.

Id.

68. *Frietas II*, 116 P.3d at 679 (quoting *United States v. DeLuca*, 137 F.3d 24, 34 (1st Cir. 1998), "The First Circuit further stated that, 'in our view [,] an appellate court should be hesitant to displace a trial court's judgment call in such circumstances'"). In the *DeLuca* case, the First Circuit Court of Appeals granted great deference to a trial court that employed an impromptu identification procedure of all trial spectators to address a perceived security risk. *Id.* The First Circuit stated that a trial court need not have firm evidence of a risk of harm, or of intimidation, to institute enhanced or unusual security procedures for a trial. *Id.* Instead, the First Circuit stated it would rely on the discretion of the trial courts to maintain the security and integrity of their courtrooms. *Id.*

69. See *Frietas II*, 116 P.3d at 680 (discussing *Williams v. State*, 690 N.E.2d 162 (Ind. 1997)). In *Williams*, the Indiana Supreme Court held that the requirement for unknown individuals to show identification and sign-in at trial did not exclude them from the proceeding. *Williams*, 690 N.E.2d at 162.

70. *Freitas II*, 116 P.3d at 680 (quoting *Williams*, 690 N.E.2d at 168-69).

71. *Id.* at 680.

procedures for public trials to make findings supporting their actions. The required findings, it indicated, should illustrate the reasons for security measures that go beyond the routine. Additionally, the Court mandated that the lower courts consider the “burdens and benefits” of adopting those enhanced procedures.⁷² Though the Indiana Supreme Court did not find identification and sign-in procedures to constitute barriers to entry, they recognized that “when access to public proceedings is impeded, even slightly, the right to be free to walk into court and assess our justice system in operation comes under threat.”⁷³ This case would appear to vindicate the *Frietas I* three-prong test.

Additionally, in *Frietas II* the Court examined *United States v. Brazel* out of the Eleventh Circuit Court of Appeals.⁷⁴ In this case, a trial court judge implemented an identification procedure because she noticed that certain trial spectators seemed to be attempting to intimidate trial witnesses and counsel.⁷⁵ The Eleventh Circuit found that a specific and limited response to a perceived security risk amounted to no more than a “partial” closure of the hearing, if any.⁷⁶ Therefore, the Eleventh Circuit determined that the trial judge did not abuse her discretion to implement the procedure, and therefore, did not violate the defendant’s sixth amendment rights.⁷⁷ In its discussion, the Eleventh Circuit stated that the right to a public trial under the sixth amendment “is not absolute and must, on occasion, give way to other rights, and interests.”⁷⁸

So ultimately, in *Frietas II* the Hawaii Supreme Court upheld the identification and sign-in procedure used by the ADLRO, and dismissed *Frietas*’ other points of appeal.⁷⁹ The dissenting opinion,

72. *Id.* (quoting *Williams*, 690 N.E.2d at 169-70).

73. *Id.* at 680 (quoting *Williams*, 690 N.E.2d at 169-70).

74. *Id.* at 680.

75. *Id.*

76. *Id.*

77. *Id.* at 680 (discussing *United States v. Brazel*, 102 F.3d 1120 (11th Cir. 1997), *cert. denied*, 522 U.S. 822 (1997)).

78. *Id.* (quoting *Brazel* at 1155).

79. *Id.* at 686, 689. These additional points of appeal were based on the procedure used by the ADLRO hearing officer to elicit evidence on the sign-in procedure, and based on the fact that the ADLRO hearing officer relied on unpublished district court decisions.

however, concluded that the procedure interfered with *Frietas*' constitutional right to a public hearing.⁸⁰ In arriving at this conclusion, the dissent relied on evidence suggesting that the ADLRO had conducted a security assessment of its premises and procedures.⁸¹ In the report, it was not indicated whether an identification and sign-in process would aid security of the hearings.⁸² Thus, the dissent applied a "clearly erroneous" standard to the ADLRO's findings and conclusions and determined that the procedure would not achieve the stated goal—to enhance hearing security.⁸³ The dissent also distinguished the cases relied upon by the majority because they pertained to a defendant's rights under the sixth amendment, rather than the due process clause (presumably under the fourteenth amendment).⁸⁴ Furthermore, the dissent found that the application of the holdings in the majority's cases should mandate the opposite result in *Frietas II*.⁸⁵

The *Frietas I* and *II* cases are important for a number of reasons. First, there are very few cases that discuss the civil rights implications of imposing security on administrative hearings.⁸⁶ Second, these cases do an excellent job of illustrating the two opposing viewpoints likely to surface on this topic. And third, the two cases outline a framework to guide an agency in how it might

80. *Id.* at 689 (Acoba, J. dissenting).

81. *Id.* at 690 (Acoba, J. dissenting).

82. *Id.* at 692 (Acoba, J. dissenting).

83. *Id.* at 691-693 (Acoba, J. dissenting). The dissent also dissected each of the ADLRO's findings, determining each of them to be substantially contrary to the record evidence such that they may be set aside under a "clearly erroneous" standard. *Id.*

84. *Id.* at 699 (Acoba, J. dissenting). The dissent argued that since *Frietas* is not a criminal defendant, he would not have a sixth amendment right to a public trial—which, if violated, would constitute automatic reversible error. Hence, the cases were of little analytical benefit to the court's analysis. *Id.*

85. *Id.* at 681, 699-700 (Acoba, J. dissenting). The majority responded to this critique, providing other cases arising from administrative law that had relied on sixth amendment analysis. *See id.* at 681 n.1. But more importantly, the majority stated it could not imagine how *Frietas* could possibly have a constitutional right to an open administrative hearing that is greater than that defendant does to a public criminal trial. *See id.* at 690 n.2.

86. One can perhaps examine the issue, as the Hawaii Supreme Court did, by analogy, looking at cases that discuss the right of access to public hearings—both in the criminal and administrative law context. *See Frietas II*, 116 P.3d at 690 n.2.

make security choices for hearings that will withstand judicial scrutiny in the long-term.

For instance, it might be beneficial to provide public notice and comment on security procedures before adopting a policy. The agency could make findings related to the test used in the *Frietas* cases that would justify the need for particular security measures in hearings. Alternatively, if an agency employs security measures beyond those generally provided to a hearing, the ALJ could elicit evidence on the record addressing the need for the added security, and make appropriate findings to support the action in an order. Even using these suggestions, an agency might not be able to avoid court challenges to its actions.⁸⁷ However, it would seem that providing findings and conclusions as an underpinning to agency action could go a long way to avoid successful challenges to agency orders stemming from security procedures.

It is also worth noting that constitutional challenges can come from the other end of the spectrum. In at least one case, a person attacked in a trial court sued the county for violating her civil rights by failing to provide sufficient security during a hearing.⁸⁸

VIII. CONCLUSIONS

ALJs need to be informed regarding the policies and procedures on safety that govern their practice. In most cases, the source of that information is the central panel, or agency where the ALJ is employed. Knowledge is power, and with that in mind, here are a

87. *Cf. Smith*, 43 P.3d at 1171 (holding that security procedures for entry into county court, which were employed pursuant to an order issued by the presiding judge of the Washington County Circuit Court, were valid and proper as an administrative act of the court), and *Zhu*, 761 A.2d at 523 (holding by the Supreme of New Jersey that a heightened security plan adopted by the trial court did not present an unacceptable risk of unfairness). The trial court implemented the standard plan for high security trials by court order issued after an evidentiary hearing. *Id.* The parties were also offered a right to appeal the order. *Id.*

88. *See Dorris v. Washoe*, 885 F. Supp 1383 (D.Nev. 1995). The United States District Court in Nevada found that a woman attacked by her former husband, during court proceedings where she sought to obtain a protective order against him, could not bring a civil rights claim against the county and its employees as she failed to demonstrate a "special relationship," and the evidence showed mere negligence in failing to prevent the attack. *Id.* at 1383-84.

few basic pieces of information to providing security in administrative hearings:

- *Know who provides security for hearings.*

In many instances, this could be a number of different jurisdictions or entities. An agency should make a list of emergency contact numbers that an ALJ can call in the event of an emergency for each hearing location. One might assume that 911 is always a good choice, but it might not be available in some rural locations. Also, state buildings can be under the jurisdiction of statewide law enforcement agencies.⁸⁹ Local police might be somewhat hesitant to respond to emergencies where another agency holds primary jurisdiction.

Additionally, an ALJ should know how far away the nearest security or police station is to a hearing location. If possible, the ALJ should also know the average time one can expect to wait for help in the event of an emergency. Having this information available could aid in the ALJ's decision of whether to call authorities for help, or to wait and see if a situation resolves itself. For instance, an ALJ could be conducting a hearing in a location within a rural community that is not controlled by the agency, and the spectators become rowdy. If the ALJ knows that law enforcement cannot get to the building in fewer than 15-20 minutes, the ALJ might be more likely to have security on-site at the beginning of a hearing.

Furthermore, many ALJs hold hearings in private buildings or business parks, such as hotels or strip-malls. If there is a security concern about a particular hearing, the agency or ALJ can touch base with security officers for the business, alerting them to any possible risks. It is likely that private businesses would want to work with the agency to avoid any trouble or negative publicity.

- *Adopt a security plan.*

Based upon the perceived risk an agency faces, this could take a number of forms. At an absolute minimum, an ALJ should know the

89. For instance, the Texas Department of Public Safety handles security in and around state buildings near the Texas Capitol.

location of all emergency exits, and how to secure help, if necessary. Beyond that minimum, an agency can write and maintain a policy for how to treat perceived or actual security risks at hearing. For instance, the policy could include a method or procedure for how an ALJ would request security in advance of hearing. It could define what grounds would trigger the need for added security precautions. In addition, the policy could allow for an ALJ to schedule a telephone or video-conference hearing in an instance where a particular individual or set of parties appear to pose a threat to safety. Rules can be adopted to allow for evidence to be presented in advance of hearing or to govern other procedures.

Again, one should be informed regarding the laws governing firearms in a jurisdiction. Even if a jurisdiction has a concealed-carry law, there may be ways to prevent permitted individuals from bringing guns to a hearing, like providing advanced notice banning weapons.

Also, one should not forget cyberspace. Most state bar associations publish the names and addresses of its attorneys, including ALJs, on-line. If it does, then its attorneys' address and telephone information is readily available to the public. So, if one uses a home address for bar-related mail, then the public has easy access to that address. For ALJs, a safer option might be using a business address.

● *Pressure professional organizations to address the issue.*

Based on the answers to the survey, many ALJs do not have a voice in decision-making regarding security for their hearings. In some cases, the respondents did not feel that their agencies took their concerns on this topic seriously. Obviously, some segment of this population is unable to voice its concerns regarding security. Organizations like the National Association of Administrative Law Judges (NAALJ) and the National Association of Hearing Officers (NAHO) should take a leadership role in addressing this important topic. Professional organizations are uniquely able to provide continued attention to security, as well as providing constituents with resources to assist in security planning.

Additional Sources:

Survey of NAALJ Members on Security, September 2005.

